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Supreme Court of the United States

OCTOBER TERM 1941

No. 1005

GEORGE BOHNKE and MRS. HENRY T. (ELOISE) BROWN,
Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COUNTY COURT OF SUFFOLK COUNTY, STATE OF NEW YORK

BRIEF ON BEHALF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE,* IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

DOROTHY KENYON
On behalf of
AMERICAN CIVIL LIBERTIES UNION
Amicus Curiae.



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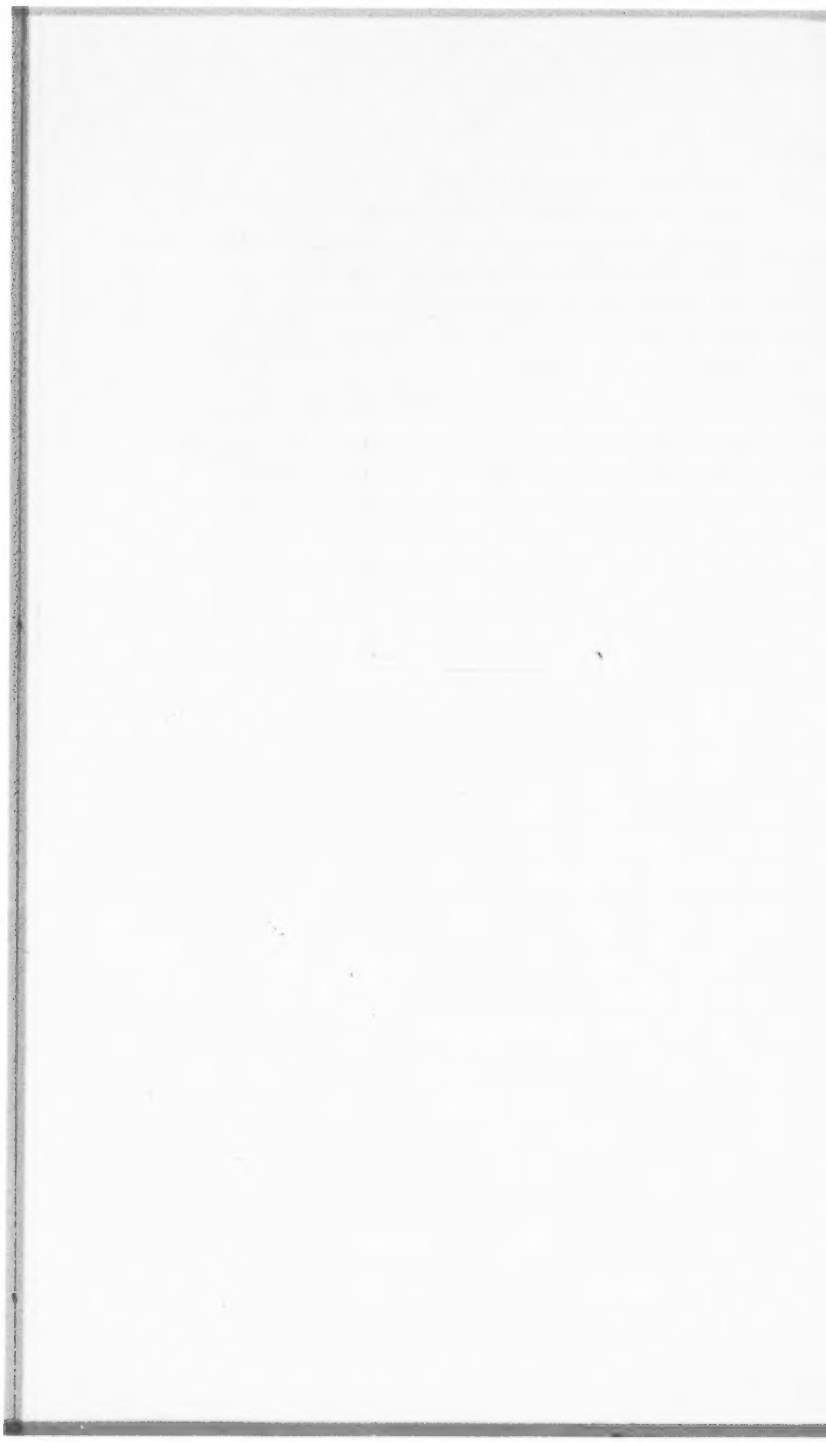
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Preliminary Statement

The American Civil Liberties Union, a non-partisan, non-sectarian organization, with a membership of thousands of persons in all the states of the Union, including New York State, has for the last twenty years or more endeavored to carry out its objects as stated in its charter, namely "to maintain throughout the United States and its possessions the rights of free speech, free press, free assemblage and other civil rights and to take all legitimate action in furtherance of such purposes." In pursuance of these objects it

has fought invasions of civil liberties wherever it has found them, has defended in the courts those whose civil rights it believed to be invaded and has appeared as amicus curiae in hundreds of cases involving issues of civil liberties.

In the opinion of the American Civil Liberties Union the preservation of the rights of free speech and free press requires that there should be no prohibition or limitation prohibitive in effect upon the distribution of ideas, whether by sales or by free distribution of printed matter and whether in public places or from house to house. Personal house-to-house distribution of tracts, pamphlets and other papers is as essentially an exercise of the right of freedom of the press and of expression generally as is the publication and distribution of newspapers and periodicals, whether through the mails or over the newsstands, and as is the dissemination of ideas by word of mouth, by personal conversations, at meetings or over the radio. Unrestricted personal distribution of this nature serves a vital democratic need. Not all of us who have thoughts and ideas which we desire to express to others, whether to a large or small audience, can broadcast them over the radio or on the pages of the great dailies. What is available to most of us is personal contact with our neighbors and fellows.

Pamphlets have played a glorious role in the history of the development of ideas. The composition of ideas in the market-place is seen at its best in pamphleteering. One of the greatest roles in the early struggles of this country against despotism, in the establishment of this nation and in the formation of our democratic form of government, was played by persons now known as the "Pamphleteers". Tom Paine, Thomas Jefferson, Samuel Adams, Alexander Hamilton, James Madison, John Jay, and others whose name is legion, wrote the philosophy and provided the ideology underlying the Declaration of Independence, our war for freedom, the Constitution of the United States and the Bill of Rights itself. Pamphlets, leaflets, tracts—without these

it is hard to visualize how we could ever have attained that unity in freedom which we all prize and love so well.

As was said in *Schneider* v. *Irvington,* 308 U. S. 147, "Pamphlets have proved most effective instruments in dissemination of opinion. And perhaps the most effective way of bringing them to the notice of individuals is their distribution at the homes of the people".

This precious right, the right to pamphleteer, must never be destroyed.

It is because of our devotion to this principle of freedom that we file this brief today. None of the governing body of the Union are members of Jehovah's Witnesses nor do they share the religious convictions of that group.

This brief is directed solely to the constitutional issues involved, more particularly as challenged in respondent's brief in opposition to the petition.

Statement of Facts

The facts themselves are simple and undisputed. Members of a religious group known as Jehovah's Witnesses went from door to door in the Village of Southampton in the early morning hours distributing leaflets in accordance with their prescribed religious practices. They went silently and neither knocked on doors nor rang doorbells, their sole purpose being distribution of the tracts. Neither of them had previously secured the consent of the occupants of the premises; neither of them had resided or maintained a place of business in the Village for six months, the two alternative requirements under the Village ordinance whose constitutionality we challenge.

I

The village ordinance in question is repugnant to the Fourteenth Amendment to the Constitution of the United States.

(1)

This type of ordinance, which is known as the "Green River type", is a criminal ordinance pure and simple as distinguished from the more common licensing type of ordinance which has been held unconstitutional when applied to non-commercial pamphlet distribution.

The Green River type of ordinance makes it criminal, with certain exceptions, to vend or distribute material from door to door. It is to be sharply differentiated from the licensing type of ordinance in the same field. The licensing (i. e. prior restraint) type has been upheld insofar as it is limited in its application to vendors of merchandise and solicitors commercial in character. The licensing type has however been held unconstitutional as in violation of freedom of speech and press insofar as it has gone beyond the commercial field and into the field of pamphlet distribution generally (see *Schneider* v. *Irvington, supra; Cantwell* v. *Connecticut*, 310 U. S. 296) although the courts have indicated that reasonable regulations might perhaps be worked out in the latter case. In *Schneider* v. *Irvington, supra*, for instance, the court says that it does not hold "that the town may not fix reasonable hours when canvassing may be done by persons having such objects as the petitioner" (i. e. Jehovah's Witness). But the general rule of law in respect to licensing ordinances is clear "To require a censorship through license which makes impossible the free and unhampered distribution of pamphlets strikes at the very heart of the constitutional guarantee".

The licensing type of ordinance having been held inapplicable to cases of door to door distribution of pamphlets, the Green River type of ordinance has been resorted to instead but so far without much success.

(2)

The Green River type of ordinance has been almost uniformly held unconstitutional, whether applied to door to door vendors of merchandise or to pamphleteers.

The first case in this field (*Town of Green River (Wyoming)* v. *Fuller Brush Co.*, 65 Fed. (2) 112, 1933, quoted at length in respondent's brief) has lent its name but not its logic to a long line of subsequent cases dealing with vendors of merchandise (as in the Green River case itself) and also with pamphlet distributors, of both the advertising and the non-commercial variety.

A

The merchandise vendor type of case.

In the line of cases dealing with vendors of merchandise the courts have almost uniformly refused to accept the reasoning of the original Green River case and have held such ordinances unconstitutional.

See

City of Orangeburg v. *Farmer* (181 S. C. 143; 1936);

Jewel Tea Company v. *Bel Air*, 172 Maryland 536; 1937 (Green River type of criminal ordinance coupled with exemptions granted to local merchants or farmers or "any one duly licensed");

Prior v. *White (Florida)* 180 So. 347, 1939;

White v. *Town of Culpeper*, 172 Virginia 630; 1939 (a combination of the Green River type of criminal ordinance, directed against solicitation, and the licensing of peddlers);

City of McAlester v. *Grand Union Tea Company*, 98 Pac. Rep. (2) 924, 1940;

DeBerry v. *City of LaGrange*, 8 S. E. (2nd) 146, 1940;

Jewel Tea Company v. *City of Geneva*, 291 N. W. 664, 1940;

N. J. Good Humor Inc. v. *Board of Commissioners*, 124 N. J. L. 162, 1940.

B

The pamphlet distribution type of case.
Advertising Pamphlets

In the line of cases dealing with pamphlet distribution a few early California cases (among them *San Francisco Shopping News* v. *City of South San Francisco,* 69 Fed. (2) 879, 1934; and *Buxbom* v. *City of Riverside,* 29 Fed. Sup. 3, both quoted at length in respondent's brief) follow the reasoning of the Green River case. But since, like the original Green River case itself, they deal entirely with commercial distribution they are no precedent for the situation in the case at bar.

Non-Commercial Pamphlets

When we come to the field of non-commercial pamphlet distribution, however, i. e. the field of the true dissemination of ideas, we find the reasoning of the original Green River case squarely repudiated. A recent line of cases in this field is closely analogous to the case at bar. Although the ordinance in question in each instance related only to the vending of merchandise the cases themselves had to do solely with with the distribution of non-commercial pamphlets—in every instance by Jehovah's Witnesses. And in each instance the courts held that the ordinance was void as violative of the Constitutional guarantees of free speech and press.

See

Zimmerman v. *Village of London, Ohio* (U. S. District Court, Southern District of Ohio, decided April 25, 1941)

Donley and Jackson v. *City of Colorado Springs* (U. S. District Court, District of Colorado, decided August 6, 1941)

E. C. Widle v. *City of Harrison, Arkansas* (U. S. District Court, Western District of Arkansas, decided Jan. 9, 1941).

(3)

While these ordinances relate only to merchandise vendors and the Southampton ordinance covers non-commercial pamphlet distributors as well, it is submitted that this is a distinction without a difference and that, if the flat prohibition of commercial vending is unconstitutonal, a fortiori the prohibition of non-commercial pamphleteering is unconstitutional as well.

(4)

The ordinance cannot be saved by asserting, as did the New York Court of Appeals, that it is not prohibitory in nature, but is merely regulatory of the subject matter and that the regulations are reasonable. It is respectfully submitted that it is prohibitory and that the exceptions granted are arbitrary and unreasonable.

As was said in *Zimmerman* v. *Village of London Ohio, supra.*

> "The arrests were made for distributing printed material upon private property without invitation of the owner or occupant. * * *
>
> "In the case now before this court, the ordinance imposes no censorship upon the 'free and unhampered distribution of pamphlets'; (quoting from *Lovell* v. *Griffin, 303 U. S. 444); it imposes what amounts to a virtual prohibition upon such distribution* * * *" (italics ours).

With all due deference to the New York Court of Appeals, it is submitted that that is precisely the situation here. The exceptions granted by this ordinance, i. e. prior consent or six months' residence in the Village, appear to us to be neither reasonable nor practicable. The Court itself admits that it is only the small size of the Village in question which gives validity to the residence requirement. It makes no attempt to justify the prior consent requirement. We question whether even in a Village of this size the inhabitants can possibly know or identify one another. The ordinance therefore in effect amounts to an absolute prohibition upon distribution.

(5)

The ordinance is an unwarranted and unreasonable exercise of the police power, not justified by any existing danger or emergency, and therefore in its application to pamphlet distributors unconstitutional and void.

As Justice Brandeis has said *(Whitney* v. *California,* 274 U. S. 357; 47 Sup. Ct. 641—1927): "Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom".

The opinion of the court below and the argument of the respondents herein rest exclusively on the proposition that the ordinance constitutes a valid exercise of the police power. They point to the danger from jewel thieves and say that the remedy is reasonably related to the end sought.

Granting the advantages to a community of a sense of peace and security, will anyone nevertheless contend that the danger from jewel thieves is great enough, the gains from their eradication (if such indeed be the result) sufficiently important to the community as a whole to justify the total prohibition of this important branch of free speech and press—namely, door to door pamphlet distribution? Are we in other words to give up free speech and press in favor of jewels—for those who have them?

If the emergency is really as great as claimed it is submitted that it is somewhat surprising that the bulk of the people of Southampton, by continuing to give implied consent to uninvited visits, appear so singularly unaware of their great peril. Were the danger as great as claimed the villagers could do a few simple and obvious things; they could put up high fences and locked gates, they could even hang out "No trespassing" signs. Were they to do so there would be no need for the Ordinance in question.

Summary

The ordinance therefore insofar as it be deemed applicable to door to door distribution of non-commercial pamphlets is clearly an unlawful invasion of the rights of free speech and free press. Insofar as these are religious pamphlets it invades the right of religious freedom as well. Insofar as it unfairly discriminates between residents and non-residents it violates the constitutional guarantee of the equal protection of the laws. And, insofar as it transcends the powers conferred upon the village by the Village Law and the police power generally, it violates due process and is ultra vires and void.

Conclusion

For the reasons above stated, it is respectfully submitted that the New York Court of Appeals erred in affirming the judgments of conviction of the petitioners herein; and, in view of the apparent variance between the Court's decision and earlier decisions of the Supreme Court in analogous cases, and also in view of the public importance of the issues involved, particularly in these days when we are all of us engaged in a worldwide struggle for our ancient freedoms, it is respectfully urged that the court grant the writ sought.

Respectfully submitted,

DOROTHY KENYON
On behalf of
AMERICAN CIVIL LIBERTIES UNION
Amicus Curiae